

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHAI ALKEBU-LAN,)	No. C 06-5991 CW (PR)
)	
Plaintiff,)	ORDER TO SHOW CAUSE AND
)	DISMISSING FIRST AMENDED
v.)	COMPLAINT WITH LEAVE TO AMEND
)	
A. P. KANE, Warden, et al.,)	
)	
Defendants.)	
_____)	

Plaintiff Shai Alkebu-lan, a state prisoner currently incarcerated at the California Medical Facility, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 and an application for in forma pauperis (IFP) status. The events giving rise to the complaint occurred while Plaintiff was housed at the Correctional Training Facility in Monterey County in this district. On June 11, 2007, the Court issued an Order Denying Leave to Proceed In Forma Pauperis Without Prejudice and Dismissing Complaint with Leave to Amend. On July 26, 2007, Plaintiff filed his first amended complaint, which the Court now reviews to determine whether it states cognizable claims for relief. Because Plaintiff complied with the requirements set forth in its June 11, 2007 Order by amending his complaint, the Court will review his IFP application anew.

I. Review of Plaintiff's First Amended Complaint

In his original complaint, Plaintiff had attempted to state claims against Defendants for the use of excessive force and for a due process violation stemming from the alleged denial of his visitation rights with his children and their mother, Memri Tagle.

In its June 11, 2007 Order, the Court found Plaintiff's

1 excessive force claim cognizable; however, it was dismissed with
2 leave to amend because Plaintiff had failed to allege with
3 specificity which Defendants proximately caused the violations of
4 his constitutional rights. Upon reviewing his first amended
5 complaint, the Court again finds that Plaintiff has not identified
6 with sufficient specificity the actions of Defendants that rise to
7 the level of excessive force. In support of his claim Plaintiff
8 states:

9 Defendants Lt. R. Lopez, Sgt. Soekardi and two unknown
10 correctional guards severely beat Plaintiff with batons,
11 fists and kicks in his head, ribs, back, neck, ears and
12 eyes resulting in Plaintiff being transferred to
California Medical Facility for Physical/Psychological
injuries and an emotional breakdown leading to
diminished vision in Plaintiff's right eye.

13 (First Am. Compl. at 3b.)¹ Standing alone, however, this
14 conclusory description of what occurred does not put the individual
15 Defendants on notice of the alleged unconstitutional conduct in
16 which they engaged. Plaintiff has failed to allege even the most
17 basic facts regarding the alleged use of force, such as the date or
18 location of the use of force as well as the cause for the alleged
19 beating. Most importantly, he has failed to allege what Defendants
20 Lopez and Soekardi did individually to contribute to the alleged
21 use of excessive force. To state a cognizable claim against
22 individual defendants, a plaintiff must set forth specific facts as
23 to each individual defendant's role in depriving Plaintiff of his
24 protected rights. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir.

26 ¹ Plaintiff attached two pages to the "Statement of Claim"
27 section on page three of his first amended complaint; therefore,
28 the Court has renumbered page three as "3a" and the two other pages
as "3b" and "3c."

1 1988). Furthermore, liability may be imposed only if the plaintiff
2 can allege and show that each defendant actually and proximately
3 caused the deprivation of a federally protected right. See id.
4 Accordingly, Plaintiff is granted leave to amend the complaint
5 against Defendants Lopez and Soekardi to set forth additional facts
6 regarding the alleged use of force, and to set forth specific facts
7 showing that each individual Defendant's actions proximately caused
8 a violation of Plaintiff's constitutional rights, provided he can
9 do so in good faith.

10 Plaintiff identifies "two unknown correctional guards" in the
11 body of his amended complaint; however, he does not name them as
12 Defendants in this action. If Plaintiff intends to sue these "two
13 unknown correctional guards," he must move to add them as
14 Defendants. Where the identity of alleged defendants cannot be
15 known prior to the filing of a complaint the plaintiff will be
16 given an opportunity through discovery to identify them. Gillespie
17 v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). Therefore, should
18 Plaintiff learn the identities of the "two unknown correctional
19 guards," he may move to file an amendment to the complaint to add
20 them as named defendants. See Brass v. County of Los Angeles, 328
21 F.3d 1192, 1195-98 (9th Cir. 2003).

22 As to the due process claim alleged in Plaintiff's original
23 complaint, the Court could not determine whether the length of the
24 deprivation of his visitation rights with his family was enough to
25 implicate the Due Process Clause. Accordingly, that claim was
26 dismissed with leave to amend to include the exact dates and the
27 length of time he was denied visitation. Plaintiff's first amended
28

1 complaint states:

2 On November 4, 2004, Defendants Memri Tagle,
3 Correctional Counselor I. J. Lozada, Lt. Stoneberg,
4 Capt. I. Guerra, [and] Corrections Guard E. S.
5 Strickland knowingly conspired and deprived Plaintiff
6 [of] his constitutional due process rights to visitation
7 and communications (Ex-1 Court Order) by generating a
8 CDC 128 B (Ex-2 General Information Chrono, resulting in
9 the complete denial of Plaintiff's
10 visitation/communication rights with his children
11 Nehanda and Angela Tagle) for the indefinite period of
12 time from November 4, 2004 to present creating a typical
13 [sic] and significant hardship on the inmate/plaintiff
14 in relation to the ordinary incidents of prison life.

15 (First Am. Compl. at 3a (citing Sandin v. Conner, 515 U.S. 472,
16 483-84 (1995)).)

17 The Court finds that the length of deprivation -- "for an
18 indefinite period of time from November 4, 2004 to present" -- is
19 enough to implicate the Due Process Clause. See Sandin, 515 U.S.
20 at 485-87 (The complete denial of visitation rights for an extended
21 or indefinite period of time may well impose "atypical and
22 significant hardship on the inmate in relation to the ordinary
23 incidents of prison life.") Therefore, Plaintiff's allegations
24 state a cognizable due process claim stemming from the denial of
25 his visitation rights with his family.

26 Plaintiff is also seeking to sue his wife, Defendant Tagle. A
27 private individual does not act under color of state law, an
28 essential element of a § 1983 action. See Gomez v. Toledo, 446
U.S. 635, 640 (1980). Purely private conduct, no matter how
wrongful, is not covered under § 1983. See Ouzts v. Maryland Nat'l
Ins. Co., 505 F.2d 547, 559 (9th Cir. 1974), cert. denied, 421 U.S.
949 (1975). There is no right to be free from the infliction of
constitutional deprivations by private individuals. See Van Ort v.

1 Estate of Stanewich, 92 F.3d 831, 835 (9th Cir. 1996). As a matter
2 of law, the facts alleged by Plaintiff cannot state a cause of
3 action under § 1983 against Defendant Tagle. Accordingly,
4 Plaintiff's claim against Defendant Tagle is DISMISSED with
5 prejudice.

6 As to Plaintiff's due process claim against Defendants Warden
7 A. P. Kane, Captain I. Guerra, Lieutenant E. D. Palmer, Lieutenant
8 Stoneberg, Associate Warden J. R. Solis, Officer E. S. Strickland,
9 and Correctional Counselors Lozada and W. B. Childress, the Court
10 finds that Plaintiff has failed to identify with specificity how
11 each Defendant actually and proximately caused the deprivation of a
12 federally protected right. See Leer, 844 F.2d at 634. Therefore,
13 Plaintiff will be given leave to amend the complaint to set forth
14 additional facts regarding the alleged due process violation in
15 order to cure this pleading deficiency.

16 Finally, Plaintiff names Sergeant B. R. Peoples as a Defendant
17 in his first amended complaint. Plaintiff, however, makes no
18 allegations whatsoever against Defendant Peoples. Because
19 Plaintiff has not linked Defendant Peoples to the allegations in
20 his first amended complaint, Plaintiff's claim cannot proceed
21 against Defendant Peoples unless Plaintiff amends his complaint to
22 cure this pleading deficiency. Accordingly, Plaintiff's complaint
23 against Defendant Peoples is DISMISSED with leave to amend.

24 II. Review of Plaintiff's IFP Application

25 Although Plaintiff may have cognizable claims for relief, he
26 may pursue those claims only if he pays the filing fee or is
27 granted IFP status. However, Plaintiff is ineligible for IFP
28 status, because the Court has dismissed three or more prior

1 prisoner actions brought by Plaintiff on the grounds that they were
2 frivolous, malicious, or failed to state a claim upon which relief
3 may be granted. See 28 U.S.C. § 1915(g).

4 The Prison Litigation Reform Act of 1995 was enacted, and
5 became effective, on April 26, 1996. It provides that a prisoner
6 may not bring a civil action IFP under 28 U.S.C. § 1915 "if the
7 prisoner has, on 3 or more prior occasions, while incarcerated or
8 detained in any facility, brought an action or appeal in a court of
9 the United States that was dismissed on the grounds that it is
10 frivolous, malicious, or fails to state a claim upon which relief
11 may be granted, unless the prisoner is under imminent danger of
12 serious physical injury." 28 U.S.C. § 1915(g).

13 For purposes of a dismissal that may be counted under
14 § 1915(g), the phrase "fails to state a claim on which relief may
15 be granted" parallels the language of Federal Rule of Civil
16 Procedure 12(b)(6) and carries the same interpretation, the word
17 "frivolous" refers to a case that is "of little weight or
18 importance: having no basis in law or fact," and the word
19 "malicious" refers to a case "filed with the 'intention or desire
20 to harm another.'" Andrews v. King, 398 F.3d 1113, 1121 (9th Cir.
21 2005) (citation omitted). Only cases within one of these three
22 categories can be counted as strikes for § 1915(g) purposes. See
23 id. Dismissal of an action under § 1915(g) should only occur when,
24 "after careful evaluation of the order dismissing an [earlier]
25 action, and other relevant information, the district court
26 determines that the action was dismissed because it was frivolous,
27 malicious or failed to state a claim." Id.

1 Andrews requires that the prisoner be given notice of the
2 potential applicability of § 1915(g), by either the Court or the
3 defendants, but also requires the prisoner to bear the ultimate
4 burden of persuasion that § 1915(g) does not bar pauper status for
5 him. Id. Andrews implicitly allows the Court to raise the
6 § 1915(g) problem sua sponte, but requires the Court to notify the
7 prisoner of the earlier dismissals it considers to support a
8 § 1915(g) dismissal and allow the prisoner an opportunity to be
9 heard on the matter before dismissing the action. See id. at 1120.
10 A dismissal under § 1915(g) means that a prisoner cannot proceed
11 with his action as a pauper under § 1915(g), but he still may
12 pursue his claims if he pays the full filing fee at the outset of
13 the action.

14 A review of the dismissal orders in Plaintiff's prior prisoner
15 actions in this Court reveals that Plaintiff has had at least three
16 such cases dismissed on the ground that they were frivolous,
17 malicious, or failed to state a claim upon which relief may be
18 granted. Plaintiff is now given notice that the Court believes the
19 following dismissals may be counted as dismissals for purposes of
20 § 1915(g): (1) Alkebu-Lan v. Hall, et al., No. CV-03-0702-UA-CT
21 (C.D. Cal. Feb. 5, 2003) (civil rights complaint dismissed as
22 frivolous); (2) Alkebu-Lan v. Lewis, et al., No. CV-F-03-05013-REC-
23 LJO-P (E.D. Cal. May 29, 2003) (civil rights action dismissed for
24 failure to amend and for failure to state a claim); and (3) Alkebu-
25 Lan v. Kane, et al., No. C 05-5069 CW (PR) (N.D. Cal. June 12,
26 2006) (civil rights action dismissed for failure to state a claim).
27 Plaintiff therefore may proceed IFP only if he is seeking relief
28

1 from a danger of serious physical injury which is "imminent" at the
2 time of filing. See Abdul-Akbar v. McKelvie, 239 F.3d 307, 312 (3d
3 Cir. 2001) (en banc); Medberry v. Butler, 185 F.3d 1189, 1192-93
4 (11th Cir. 1999); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir.
5 1998); Banos v. O'Guin, 144 F.3d 883, 885 (5th Cir. 1998). Here,
6 although Plaintiff allegedly was in imminent danger of serious
7 physical injury at the time he was attacked by Defendants, imminent
8 danger is assessed at the time a prisoner files a civil rights
9 action, rather than at the time of the incidents giving rise to the
10 prisoner's claims. See id. At the time Plaintiff filed this
11 action, he was housed at the California Medical Facility and was
12 not in any danger of attack by Defendants. Therefore, the Court
13 finds that the imminent danger exception to the three-strikes bar
14 is not applicable to this action.

15 In light of these dismissals, and because Plaintiff does not
16 appear to be under imminent danger of serious physical injury, he
17 is ORDERED TO SHOW CAUSE in writing no later than thirty (30) days
18 from the date of this Order why IFP should not be denied and this
19 action should not be dismissed pursuant to 28 U.S.C. § 1915(g).
20 If Plaintiff is so inclined, he may avoid dismissal by paying the
21 \$350.00 filing fee. In any event, the Court will continue to
22 review under § 1915(g) all future actions filed by Plaintiff while
23 he is incarcerated in which he seeks IFP status.

24 CONCLUSION

25 For the foregoing reasons, the Court orders as follows:

26 1. Plaintiff's claim against Defendant Tagle is DISMISSED
27 with prejudice.
28

1 2. Plaintiff's claims against all remaining Defendants are
2 DISMISSED with leave to amend to cure the pleading deficiencies
3 outlined above.

4 3. Plaintiff is ORDERED TO SHOW CAUSE in writing no later
5 than thirty (30) days from the date of this Order why IFP should
6 not be denied and this action should not be dismissed pursuant to
7 28 U.S.C. § 1915(g). If Plaintiff is so inclined, he may avoid
8 dismissal by paying the \$350.00 filing fee no later than thirty
9 (30) days from the date of this Order.

10 Failure to file a timely response or failure to pay the full
11 filing fee within thirty (30) days from the date of this Order will
12 result in the dismissal of this action without further notice to
13 Plaintiff.

14 4. If Plaintiff pays the full filing fee within the thirty-
15 day time frame, he may file a second amended complaint within
16 thirty (30) days of paying the filing fee. He must use the
17 attached civil rights form, write the case number for this action
18 on the form, clearly label the complaint "Second Amended
19 Complaint," and complete all sections of the form.

20 Failure to file a timely second amended complaint within (30)
21 days from paying the filing fee will result in the dismissal of
22 this action without prejudice.

23 5. It is Plaintiff's responsibility to prosecute this case.
24 Plaintiff must keep the Court informed of any change of address and
25 must comply with the Court's orders in a timely fashion. Failure
26 to do so may result in the dismissal of this action for failure to
27 prosecute pursuant to Federal Rule of Civil Procedure 41(b).
28

1 6. The Clerk of the Court shall send Plaintiff a blank civil
2 rights form along with a copy of this Order.

3 IT IS SO ORDERED.

4 DATED: 6/4/09


CLAUDIA WILKEN
United States District Judge

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SHAI ALKEBU-LAN,

Plaintiff,

v.

A.P.KANE et al,

Defendant.

Case Number: CV06-05991 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 4, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Shai Alkebu-lan CDC# P-02598
California Medical Facility (H-320 Low)
P.O.Box 2000
Vacaville, CA 95696-2000

w/blank CR form

Dated: June 4, 2009

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California